

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION**

THOMAS SURPRENANT,	:	
Individually and on behalf of all	:	
other similarly situated,	:	
	:	
Plaintiff,	:	
	:	
v.	:	Civil File No.: 1:17-CV-05330-WSD
	:	
BEHR PROCESS CORP.; BEHR	:	
PAINT CORP.; MASCO CORP.;	:	
THE HOME DEPOT, INC.; and	:	
HOME DEPOT U.S.A., INC.,	:	
	:	
Defendants.	:	

NOTICE OF SETTLEMENT AND CONSENT MOTION TO STAY

Plaintiff Thomas Surprenant (“Plaintiff”), Defendants Home Depot, Inc., and The Home Depot, U.S.A., Inc. (collectively, “Home Depot”), and Defendants Behr Paint Corp., Behr Process Corporation and Masco Corporation (collectively, “Behr” and together with Plaintiff and Home Depot, the “Parties”) hereby consent to and move the Court for a stay of the above-captioned action pending consideration of a nationwide class action settlement pending before another district court in a related case. See disc. infra at 1-5.

I. RELEVANT FACTUAL BACKGROUND

In late 2017, Behr announced that it had reached an agreement in principle with respect to the substantive relief in a nationwide class action settlement with

plaintiffs in three actions before other district courts (Anderson v. Behr Process Corp., Case No. 1:17-cv-08735 (N.D. Ill.); Bishop v. Behr Process Corp., Case No. 1:17-cv-04464 (N.D. Ill.); and In re Behr, Case No. 8:17-cv-01016 (C.D. Cal.)) that it represented would resolve all claims in this action against all Defendants, contingent upon finalizing a mutually-agreeable, written settlement agreement and of course, preliminary and final approval. See Behr Mem. in Opp. to Mot. for Transfer and Consolidation, In re: Behr DeckOver Marketing and Sales Practices Litigation, MDL No. 2821 (Dkt. #30) at 1-2 (hereinafter, the “MDL”); Order Denying Transfer (MDL Dkt. #53) at 1). On May 1, 2018, plaintiffs in Bishop filed an amended complaint that incorporated the named plaintiffs in In re Behr and Anderson. See Am. Compl. (Bishop Dkt. #60) (hereinafter the “Bishop Complaint”) at ¶¶ 7-39). On May 3, 2018 plaintiffs in Bishop filed a motion for preliminary approval of a class action settlement that Defendants believe will resolve all claims made in the above-captioned action against all Defendants. See Bishop Settlement (Bishop Dkt. #61-1) at passim. Defendants expect that the Bishop court will consider the motion for preliminary approval at a hearing scheduled for May 15, 2018. See Notice of Motion (Bishop Dkt. #67) at 1.

II. DISCUSSION

A district court may stay a case pending the resolution of related proceedings in another forum. See Joseph v. Barclays Bank Del., 2016 U.S. Dist.

LEXIS 183790, *1-2 (N.D. Ga. 2016). “When deciding whether to grant a stay, courts generally consider the following factors: (1) whether a stay would unduly prejudice or present a tactical disadvantage to the nonmovant; (2) whether a stay will simplify the issues in the case; and (3) whether discovery is complete and a trial date has been set.” Id. District courts routinely stay actions pending the review and approval of related class settlements in other district courts. See, e.g., Albert v. Blue Diamond Growers, 232 F. Supp. 3d 509 (S.D.N.Y. 2017); Ali v. Wells Fargo Bank, N.A., 2014 U.S. Dist. LEXIS 26670, *7-9 (W.D. Okla. 2014); Lindley v. Life Investors Ins. Co. of America, 2009 U.S. Dist. LEXIS 94623, *11 (N.D. Okla. 2009); In re RC2 Corp. Toy Lead Paint Products Liability Litigation, MDL No. 1893, 2008 U.S. Dist. LEXIS 14121, *13-14 (N.D. Ill. 2008); Annunziato v. eMachines Inc., 2006 U.S. Dist. LEXIS 97020, *15-16 (C.D. Cal. 2006).

The Parties have agreed that a stay of this action is appropriate. See disc. infra at 3-5. First, no Party would suffer any hardship if this case was stayed pending consideration of the Bishop Settlement, as Plaintiff and all proposed class members in this case would have the right to participate in the settlement or opt out of it and pursue his or her own litigation. See Amchem Prods. v. Windsor, 521 U.S. 591, 597 (1997). Furthermore, if Plaintiff or any member of a proposed class opts out of the Bishop Settlement, the stay will be limited and he or she will retain

his or her right to pursue his or her claim. See id.

Second, because the parties and litigants in Bishop are nearly identical to those in the above-captioned action, a stay will simplify the issues in this case by allowing the Bishop court to evaluate a class settlement that Defendants believe will fully resolve all claims in this action. See disc. infra at 4. Behr and Home Depot are named as defendants in both this case and in Bishop. Compare Bishop Complaint (Bishop Dkt. #60) at ¶¶ 40-43 with Compl. (Dkt. #1) at ¶¶ 8-11. Moreover, the classes Plaintiff seeks to represent in this case are subsumed within the Bishop settlement class. Compare Bishop Settlement (Bishop Dkt. #61-1) at § III.A (settling on behalf of “[a]ll persons and entities that, between September 1, 2012 and the date of Preliminary Approval, purchased DeckOver in the United States (or caused it to be purchased) and applied it (or caused it to be applied) to any property located in the United States owned or leased by the purchasing person or entity”) with Compl. (Dkt. #1) at ¶ 41 (seeking to represent three classes, including: “[a]ll persons who purchased a Behr Premium DeckOver in the United States,” “[a]ll persons who purchased a Behr Premium DeckOver in the state of New York” and “[a]ll persons who purchased a Behr Premium DeckOver in the state of Georgia.”). Moreover, both cases focus on the advertising, marketing and performance of DeckOver. Compare, e.g., Bishop Complaint (Bishop Dkt #60) at ¶¶ 1-2 with Compl. (Dkt. #1) ¶¶ 1-2.

Third, and finally, a stay is appropriate because no discovery has occurred in this action, and no trial date has been set. See Joint Preliminary Report And Discovery Plan (Dkt. #39) at passim. As such, a stay will likely save the Parties significant energy and expenditure that otherwise would be devoted to the discovery process, and to litigating this action. See Annunziato, 2006 U.S. Dist. LEXIS 97020 at *15-16 (“[I]f the Ohio state court approves the preliminary settlement, [litigants] would be saved from hundreds of hours spent on discovery and briefing in proceeding with this case.”).

WHEREFORE, the Parties respectfully request that the Court enter the proposed order attached hereto as Exhibit A.

CONSENTED and AGREED this 11th day of May, 2018.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this pleading has been prepared in compliance with Northern District of Georgia's Local Rule 5.1B. This pleading has been prepared in Times New Roman 14 point font.

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	:
Defendants.	:

CERTIFICATE OF SERVICE

I hereby certify that on May 11, 2018, I electronically filed the foregoing NOTICE OF SETTLEMENT AND CONSENT MOTION TO STAY with the Clerk of the Court using the CM/ECF system which will automatically send e-mail notification of such filing to all attorneys of record:

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This 11th day of May, 2018.

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